IRB FINANCE BERHAD

v.

BORNEO INSURANCE SDN. BHD.

HIGH COURT, BRUNEI DARUSSALAM
SIR DENYS ROBERTS CJ
[CIVIL SUIT NO. 33 OF 1994]
7 JUNE 1995

INSURANCE LAW: *Insurance policy - Policy taken out by hirer for car hired from finance company - Finance company not named in the insurance policy as owner of the car - Default by hirers - Cars untraceable - Whether finance company can assert its rights against the insurance company.*

INSURANCE LAW: *Insurance policy - Policy taken out by hirer for cars hired from finance company - Finance company named as owner of the car - Default by hirers - Cars untraceable - Whether policy confers rights on finance company - Whether rights of finance company co-extensive with that of the hirer.*

CONTRACT: *Contract of insurance - Policy taken out by insurer - Whether policy issued to hirer covers interests other than his own - Whether only party privy to the contract can benefit from the contract.*

The plaintiff, a finance company, had agreed to finance the purchase of four cars by one Tan Sei Ming (Tan) and one Melvin Tshen Chen Yik (Tshen) through hire purchase agreements. Deposits were accordingly paid by the hirers which included payment for insurance. Before the vehicles were taken away by the hirers, cover notes were issued by the defendant, who received the insurance payments from the dealer. Thereafter no hire purchase instalments were paid by either Tan or Tshen. When the plaintiff's attempts to trace the vehicles proved unsucessful, the plaintiff made a police report and the insurance company was notified about the default of the hirers. The plaintiff claimed for losses incurred on the basis that the peril covered was "theft" and that the interest of IRB was registered in the schedule of each vehicle's policy and subsequently obtained judgment in default against the hirers. It later transpired that no endorsement was made on the cover note, the motor vehicle insurance application form or the endorsement on the insurance policy issued on one of the vehicles, to suggest that Tshen was the hirer and not the owner. The plaintiff, however, was named in the proposal form as the hire purchase owner of the other three vehicles.

The plaintiff sought for a declaration that it was entitled to be indemnified against all damages suffered by reason of the theft and/or malicious act of the hirers. The issue for the Court to decide was whether it was open for the finance company to take proceedings against the insurance company for breach of an agreement to which the insurance company was not a party to and whether the insurance company was liable under the insurance policy to the finance company with which it had no dealing.

Held:

[1] The omission of endorsements are important in deciding on the intention of the parties, when the insurance policy was issued. It may well have been the intention of the the finance company to bind the insurance company, but the latter was never warned of this intention. It would not be right for a person who is not a party to the contract, to be bound to his

detriment to someone of whose existence he has no knowledge. This holds true in respect of the first car.

[2] In respect of the other three cars, the finance company has the same rights as that of the insured by reason of the endorsement on the insurance policy, whereby the insurance company undertook to pay insurance money arising under the policy directly to the finance company. The policy was also for the benefit of the finance company, as well as for the protection of the hirer, who was a party to the insurance policy.

[3] The contract between the hirer and the defendant confers rights/benefits to the plaintiff thereby making the plaintiff a party who has co-extensive rights with the hirer. The intention of the hirer is to cover the interest of the plaintiff as well as his own. In spite of the general rule that only parties who are privy to a contract can benefit from it, exception arises whenever it is clear from the construction of the contract of insurance that it was the intention that the interests of the finance company should also be protected.

[4] The insurance policy did not intend to include as an insured peril, theft by a hirer, but theft by someone else of the car which was covered by the policy. Nevertheless if it could be shown that a car had been sold by a hirer, he could be said to have committed a "malicious act", which is an insured peril. There is no evidence that this has taken place and the burden lies on the plaintiff to show that the defendant has covered the loss. Until this is done, the defendant is not liable.

[5] Accordingly the Court makes a declaration on that the plaintiff is entitled if it established that a peril insured under the relevant insurance policy has occurred, to be indemnified by the defendant against any loss or damages suffered thereby. The declaration will extend only to vehicles BL9078, BL9477 and BL9455.

[Declaration granted as varied by the Court, 75% costs to the plaintiff].

Cases referred to:
Yangstze Insurance Association v. Lukmanjee [1918] AC 585 PC ***(refd)***
Malaysian Australian Finance Co. Ltd. v. The Law Union & Rock Insurance Co. Ltd. [1972] 2 MLJ 10 ***(refd)***
United General Insurance Co. Sdn. Bhd. v. Progress Credit Sdn. Bhd. [1988] 2 MLJ 297 ***(refd)***
Tomlinson v. Hepburn [1966] AC 466 HL ***(refd)***
Lombard Australia v. NRHA Insurance Ltd. [1969] 1 Lloyd's Rep. 575 ***(refd)***

Legislation referred to:
Penal Code, ss. 378, 405

For the plaintiff - Y.C. Lee
For the defendant - Andrew Ong

JUDGMENT

Denys Roberts CJ:

Background

IRB Finance Berhad ("IRB") the plaintiff, is a finance company which, among other things, advances money to the purchasers of motor vehicles.

Borneo Insurance Sdn. Bhd. ("BI") is an insurance company, operating in Brunei. It insures some of the motor vehicles in respect of which the plaintiff has lent money. Other insurance companies use policies which are similar to those used by BI.

The plaintiff does not select the insurance company. This is chosen by the purchaser of the car, or the dealer who sells it to him.

The buyer of a motor vehicle cannot take it on the road without a valid insurance. He therefore fills in an application form, which the dealer (in these four cases NBT(B) Sdn. Bhd.) sends to an insurance company, which pays him a commission.

Before the form has been completed and sent to the insurance company, the finance company makes such enquiries as it thinks proper into the credit worthiness of the applicant. The evidence of Mr Alfred Young suggests that these enquiries were no more than perfunctory in many cases.

However, as he explained, the finance company is protected by its rights over the vehicle itself, which it can repossess if the purchaser should default in any of the instalments due. In addition, the finance company would expect the buyer to deposit about 25% of the price of the vehicle, which gives the finance company a measure of security.

The Vehicles Concerned

There are four vehicles involved. BL 9078, BL 9364, BL 9477 and BL 9455.

BL 9078. Hirer Tan Sei Ming ("Tan"). Date of the hire purchase agreement was 10 July 1992. The first instalment was due on 28 August 1992. Amount insured for B$37,000. Amount of loan B$29,000. Owner IRB.

BL 9364. Hirer Melvin Tshen Chen Yik ("Tshen"). Date of the hire purchase agreement was 27 July 1992. The first instalment was due on 28 August 1992. Amount insured B$65,000. Amount of loan B$52,300. Although IRB was the owner, this was not endorsed on the insurance policy of this vehicle.

BL 9477. Hirer Tshen. Date of the hire purchase agreement was 29 July 1992. The first instalment was due on 29 August 1992. Amount insured B$65,000. Amount of loan B$52,800. Owner IRB.

BL 9455. Hirer Tshen. Date of the hire purchase agreement was 5 August 1992. The first instalment was due on 28 September 1992. Amount insured B$65,000. Amount of loan B$52,800. Owner IRB.

In each case, a deposit was paid by the purchaser, Tan in the case of BL 9078, and Tshen in the case of BL 9364, BL 9477 and BL 9455.

The first amounts due to the finance company were paid as part of the purchase deposit. But no hire purchase instalments have been paid by either Tan or Tshen since then. All four vehicles were taken away by them. Before they did so, cover notes were issued by the defendant, who received the insurance payment from the dealer. The latter had included this in the deposit price.

The plaintiff advertised, without success, in the Miri News and the Borneo Bulletin on 28 January 1993 for these vehicles, which have not been seen since they were taken from the dealer.

On 26 January 1993, the plaintiff, through Dk Hjh Zaitun bte Pg Hj Jaya, an employee of the plaintiff, made a report to the Royal Brunei Police Force, stating that IRB was unable to trace the four vehicles (and others which are not relevant).

The insurance company was notified of the default of the hirers of the vehicles on 4 March 1993, in which IRB said that:

> the abovenamed vehicles have been missing for approximately six to seven months. We believe the vehicles may be stolen.

In this letter, IRB makes a claim against BI for the losses incurred, claiming that the peril covered is "theft" and that the interest of IRB is registered in the schedule of each vehicle's policy.

Judgment in default was obtained by the plaintiff against the hirers of these vehicles on 20 September 1993. The writs had to be served on each hirer by means of substituted service - i.e. by advertisement in the Borneo Bulletin.

There was evidence that the police commercial crimes unit is investigating the disappearance of the four vehicles and the failure of the two hirers to pay any instalments.

Although there has been a report to the police that the vehicles have been seen in Sarawak, this has not been confirmed. Although Tan has been sent to prison, on another charge unconnected with these matters, and he and Tshen are under investigation, they cannot be positively linked to the disappearance of these vehicles, however strong the suspicion must be that they have taken the vehicles and converted them. Whether or not they can nevertheless be presumed to have acted in a manner covered by the insurance policy is to be decided later.

Liability of Insurance Company

Each of the two hirers entered a policy of insurance with BI, for which the hirer made a payment, although IRB itself did not. Is it open to the finance company to take proceedings against the insurance company (BI) for breach of an agreement to which BI was not a party? Is the insurance company (BI) liable under the insurance policy, to IRB, with which it had no dealings?

The general principle is that there must be privity of contract between two persons, before one of them may sue the other for the breach of the conditions of a contract - see *Yangstze Insurance Association v. Lukmanjee* [1918] AC 585 PC. Therefore the parties to a contract (the hirers and BI) cannot confer enforceable rights on a third party (IRB) which is not itself a party to it. This is the general principle. Is it subject to any exceptions? If so, what are the conditions which have to be met?

There is one important feature in which BL 9364 differs from the other three vehicles concerned.

There was no endorsement, on the cover note, the motor vehicle insurance application form or the endorsement on the insurance policy issued by BI on this vehicle, to suggest that Tshen was only the hirer, and not the owner, of BL 9364. So far as BI was concerned, Tshen appeared to be the owner. The space in the proposal form, for the insertion of the owner's name, was left blank. IRB is shown there as the "hire purchase owner" in the application forms of the other three vehicles.

These omissions are of importance in deciding on the intention of the parties, when the insurance policy was issued. I do not consider that BI can be said to have issued the policy on BL 9364 knowing that this was for the protection of IRB, when it did not know that IRB

had any interest in the vehicle. In the absence of any entry on the proposal form identifying IRB as the owner, or of any endorsement on the policy, obliging BI to hand money due under the policy to IRB, BI would have assumed that Tshen, and not IRB, was the owner.

The cases which were cited establish that the finance company (IRB) could proceed if the policy was effected on behalf of IRB or to protect the interests of IRB as well as those of the hirer. It may well have been the intention of IRB to bind BI, but the latter was never warned of this intention. It cannot be right, in my view, for a person who is not a party to the contract, to be bound to his detriment to someone of whose existence he has no knowledge.

What I say below as to the liability of BI, therefore, concerns only vehicles BL 9078, BL 9477 and BL 9455. I do not consider that BI can be liable to IRB under the insurance policy issued by it in relation to BL 9364.

In *Malaysian Australian Finance Co. Ltd. v. The Law Union & Rock Insurance Co. Ltd.* [1972] 2 MLJ 10, Mohammed Azmi J, in an originating summons at first instance, had to decide whether the finance company had rights "co-extensive" with those of the insured, and could institute claims in its own name against the insurance company.

The Judge decided that the finance company had the same rights as the insured.

At p. 12G he comments:

> In the present case, because of the fact that the respondent (insurance company) has taken upon itself in the relevant endorsement to pay the applicant (finance company) direct in respect of money arising to be paid under the policy and the fact that the insurance policy was in fact for the applicant's benefit, the respondent should be regarded as the trustee and/or agent of the applicant.

The usual form of insurance was issued by BI in three cases. The final clause of the insurance policy reads as follows:

> It is hereby declared and agreed that IRB (Hereinafter referred to as owners) are the owners of the motor vehicle that the motor vehicle is the subject of a hire purchase agreement made between the owners of the one part and the insured of the other part. It is further understood and agreed that the owners are interested in any monies which but for the endorsement would be payable to the insured under this policy in respect of loss or damage to the motor vehicle (which loss or damage is not made good by repair reinstatement or replacement) and such monies shall be paid to the owners as long as they are the owners of the motor vehicle and their receipt shall be a full and final discharge to the company in respect of such loss or damage.
>
> Save as by this endorsement expressly agreed nothing herein shall modify or affect the rights or liabilities of the insured or the company respectively under or in connection with this policy.

Mohamed Azmi J based his decision on his findings that:

(a) the endorsement on the insurance policy, whereby the insurance company undertook to pay any insurance money arising under the policy directly to the finance company, and

(b) by reason of the endorsement, the policy was for the benefit of the finance company, as well as for the protection of the hirer, who was a party to the insurance policy.

The endorsement to which he refers is in the same terms as that which I have quoted above. It appears in the policies issued to Tan and Tshen by BI.

The endorsement in the BI policies gives a right to the owners of the vehicles to receive any monies due under the policy, in respect of the vehicles insured. Without doubt, this endorsement does benefit the finance company. Is this sufficient?

Does the fact that a contract between A and B confers certain rights on C, who is not a party to the contract, make C a party as well, so that his rights become co-extensive with those of B under the contract?

Mohammed Azmi J concludes that it can, for the reasons which he has given. He adds that a disclaimer of liability by the insurance company to the hirer will not prevent the finance company from making a claim, because the intention of the hirer is to cover the interest of the finance company, as well as that of the hirer.

The Judge therefore found that the finance company had rights which were "co-extensive" with those of the hirer in instituting claims in its own name against the insurer.

In *United General Insurance Co. Sdn. Bhd. v. Progress Credit Sdn. Bhd.* [1988] 2 MLJ 297, the Supreme Court of Malaysia assumed, though not directly approving it, that the *Malaysian Australian Finance* case was correctly decided.

Support for the proposition that an insurance policy issued to a hirer can be held to cover interests other than his own may be found in *Tomlinson v. Hepburn* [1966] AC 466 HL.

In the latter case, the House of Lords held that the issue of what interest the assured intended to cover under the policy must be determined by an examination of the policy itself.

A hirer, who borrows from a finance company to enable him to buy a car, is obliged to effect an insurance by the hire purchase agreement which he enters. Can a finance company, known by the insurance company to be the owner, by reason of the contents of the proposal form and the endorsement on the insurance policy in its favour, take proceedings in its own name?

In such circumstances, it can be said that the true intention of the parties was that the insurers intended to contract with the hirer and owner for their respective rights and interests - see *Lombard Australia v. NRHA Insurance Ltd.* [1969] 1 Lloyd's Rep. 575.

In spite of the general rule that only parties who are privy to a contract can benefit from it, I find that IRB can bring a claim against BI, in relation to vehicles of which it is known by BI to be the owner.

This is one of the exceptions to the general rule and will arise whenever it is clear from a construction of the contract of insurance that it was the intention that the interests of the finance company should also be protected. I comment in passing that the interest of the finance company, at the moment of purchase of the car, is very large even if this declines as more instalments are paid.

If the finance company is protected in this way, is it barred from making a claim if the hirer himself is barred? In the *Lombard* case, there was a joint insurance and the suicide of one party to it did not prevent the other party from making a claim.

Only the hirer was a direct party to the insurance contract, IRB is deemed to have become a party by virtue of the intention, which is inferred, of protecting the interest of the finance company as well.

In *Lombard*, the finance company was one of the joint insurers. In these cases IRB has become a party by implication. I do not think that this will put it in a worse position than an insured which is expressly named in the insurance policy.

The interest of IRB is thus separate from that of the hirer, so that it can pursue its claims under the policy. This does not mean that it is not bound by the terms of the policy.

What it is **not** bound by is the conduct of the hirer. Unless it is a party to some illegal act, or some act in contravention of the policy, by the hirer, it can pursue the remedies available under the policy on its own behalf.

Ambit of the Policy

I have so far found that:

(a) IRB is a party to the insurance policy,

(b) IRB can claim against BI for loss or damage which it has suffered,

(c) an unsuccessful claim made by the insured hirer does not prevent IRB from making a claim, so long as IRB is not a party thereto, and

(d) IRB must observe the terms of the contract.

I must decide whether, in the circumstances of these cases, what has happened falls within the perils covered by the insurance policy and, if it does, whether IRB has offended this policy in some other way.

By the terms of the insurance policy, BI undertakes to indemnify the hirer against loss or damage which is caused:

(a) by accidental collision or overturning or collision or overturning consequent upon mechanical breakdown or consequent upon wear and tear;

(b) by fire external explosion self-ignition or lightning or burglary, housebreaking or theft;

(c) by malicious act;

(d) while in transit...

It has been submitted that the insurance policy is in terms which will include as an insured peril a vehicle, subject to such a policy, which has disappeared, and in relation which no payment of hiring instalments has been made.

This is a matter of proof. If a person can be shown to have stolen the vehicle, this would be an insured peril, entitling the insured to claim the value of the vehicle from the insurance company.

However, it must be remembered that theft is an offence against possession, and not ownership. Theft is defined in s. 378 of the Penal Code as committed when a person:

> intending to take dishonestly any movable property out of the possession of any person without that person's consent, moves that property in order to such taking.

If one of the hirers, who is entitled to be in possession of a car, himself sells the car, it is doubtful if he could be said to have committed theft.

The insurance policy did not intend to include, as an insured peril, theft by a hirer, but theft by someone else of the car which was covered by the policy.

Nevertheless, if it could be shown that a car had been sold by a hirer, he could be said to have committed a "malicious act", which is an insured peril.

However strong the suspicion may be that the vehicles concerned have been sold by the hirers, there is as yet no evidence that this has taken place. The burden lies on IRB to show that the insurance company has covered the loss. Until this is done, the insurance company is not liable.

A malicious act is no more than a wrongful act intentionally done without just cause. The insurance policy includes this as an insured peril. But there is no evidence that this has occurred either.

All that is known about the cars is that they are thought to be in Sarawak. There is as yet no proof as to how they came there. This may be forthcoming. So far, it has not been.

There is a failure by the hirer to pay any instalments under his hire-purchase agreement with IRB. I do not consider that this could be regarded as a malicious act under the insurance policy. Many hirers fall behind with their payment of hiring charges and I do not regard this of itself as a malicious act.

It is argued that there has been a criminal breach of trust, contrary to s. 405 of the Penal Code. This would be committed by a hirer who sells a vehicle when he has not made payment in full to the person from whom he hired it.

It is said that an offence under this section might also amount to a malicious act, such as would amount to an insured peril under the policy. I think that it probably would, since the phrase "malicious act" is a wide one and may include a criminal breach of trust.

Again, it is a matter of proof. There is no need to obtain a conviction first. Any information as to the whereabouts of the vehicles, from which a sale by the hirer, or the commission by him of a criminal breach of trust, could reasonably be inferred will be sufficient to constitute a malicious act. Unfortunately, there is not yet sufficient evidence to say that anything has happened to the cars which falls within an insured peril in the insurance policy.

Time

It is a condition of the insurance policies issued by BI that:

> In the event of any occurrence which may give rise to a claim under this policy, the insured shall as soon as possible gave notice thereof to the company with full particulars.
>
> ...
>
> In case of the theft or other criminal act which may give rise to a claim under this policy, the insured shall give immediate notice to the police and co-operate with the company in securing the conviction of the offender.

The insured himself has given no notice under the policy, either to the company or the police. What has IRB done, on the assumption that it can enforce against the insurer the same rights as were conferred on the hirer under the insurance policy?

The first instalments were due on 27 August 1992, 28 August 1992, 29 August 1992 and 28 September 1992.

The company (BI) was notified on 4 March 1993. The police were informed on 26 January 1993, two days before the advertisements for the missing vehicles were placed, in the Miri News and the Borneo Bulletin.

Mr Yong, for IRB, says that he did not notifiy BI of the default of the hirers until 4 March 1993 because "he had to be sure that the hirer was not going to pay up and that the vehicle was gone for good".

He advertised in the Miri News and the Borneo Bulletin on 28 January 1993. He was not at that time sure that any criminal offence had been committed by the hirers, though no doubt he suspected this.

The first instalments were due before the end of August 1992, in two cases and before the end of September 1992 in the third.

The company was not informed until 4 March 1993, 5 or 6 months after the first default by the hirers. It is understandable that IRB should be reluctant to take action for a reasonable time after the vehicles were first financed by it. It has to bear in mind that many of those who enter hire purchase agreements with the company fall behind in the payment of their instalments and are honest, if not meticulous about setting their debts.

IRB must be careful not to make a report to the police until it is reasonably sure that a criminal act has been committed with respect to the vehicle. It is therefore understandable that it should have waited for four or five months before reporting the matter to the police.

It is a sufficient compliance with this condition of the insurance policy for a report to be made to the police immediately upon deciding that a claim might have to be made, on the ground that there had been a theft or other criminal act in relation to the car.

However, there was no report to the company (BI) for about five weeks after the notification to the police, from 26 January to 4 March. Can it be said that this is a compliance with the requirement of the insurance policy that a report should be made to the company "as soon as possible?"

I do not think it can. There was, I have no doubt, a failure to obey this condition. I suspect that it may simply have been overlooked. But does this failure mean that the finance company will fall at the last fence, because it has not met a relatively unimportant provision in the insurance contract?

There are a number of cases which distinguish between a term of a contract, which is a condition, and an intermediate term (which used to be called a warranty).

A term will only be regarded as a condition, if the nature of contract, or its subject matter or the circumstances of the case lead to the conclusion that the parties must, by necessary implication, have intended that the innocent party would be discharged from further performance of his obligations if the term was not fully and precisely complied with.

I do not regard this term as a condition, or a failure to comply with it as entitling BI to regard itself as discharged from the policy. It could claim damages for this failure, but that is all.

Summary

It follows from what I have found above that the declaration sought by the plaintiff can only be made when it is established that one of the perils covered by the insurance policy is shown to have occurred.

This means that as soon as it becomes clear that there has been a criminal breach of trust or other malicious act, which would include a sale, by the hirer, IRB can lodge a claim against BI.

The plaintiff seeks a declaration that the plaintiff is entitled to be indemnified against all damages suffered by reason of the theft and/or malicious act of the hirers. As I have found above, the liability of BI must depend, in this instance, on information that the hirer has behaved in such a manner as to commit an act which constitutes an insured peril under the insurance policy.

If a valid claim is made by IRB, on the basis of information from a reliable source, the damages which IRB could properly claim would be the amount which IRB lent to the purchasers, that is to say B$29,000 on BL 9078, B$52,800 on BL 9477 and B$52,800 on BL 9455, a total of B$134,600.

The insurance policy limits the liability of BI, where a claim is made in respect of the theft of the vehicle, to 75% of the insured value or the market value, whichever is the less.

I do not consider that this limitation would apply in these cases, if the claim is based upon a malicious act by the hirer, not upon theft of the vehicle.

For the above reasons, I cannot make the declaration in the terms sought. I can do so only in these terms:

> The plaintiff is entitled, if it establishes that a peril insured under the relevant insurance policy has occurred, to be indemnified by the defendant against any loss or damage suffered thereby.

This declaration will extend only to vehicles BL 9078, BL 9477 and BL 9455.

The damage suffered by the plaintiff would amount to $134,600, if the condition specified in the declaration is satisfied.

The plaintiff has succeeded in the majority of his contentions, though not all of them and has failed to secure the declaration sought in the terms in which this was sought. It has succeeded in the substance of its claim.

I think that the correct order is that the defendant should pay 75% of the plaintiff's costs, such costs to be taxed if not agreed. The order for costs will stand, provided that neither party applies within 14 days to make submissions as to costs.